No. 85350-9

SUPREME COURT OF THE STATE OF WASHINGTON
(Court Of Appeals No. 38411-6-II)

VISION ONE, LLC and VISION TACOMA, INC.,

Petitioners,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Respondent.

AMICUS PETITION OF BUILDING OWNERS AND MANAGERS ASSOCIATION AND NAIOP - WASHINGTON STATE CHAPTER

Joseph E. Lynam, WSBA No. 12728
Abraham K. Lorber, WSBA No. 40668

LANE POWELL PC
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101-2338
Telephone: 206.223.7000
Facsimile: 206.223.7107

Attorneys for Amici Curiae Building Owners and Managers Association Seattle/King County, Building Owners and Managers Association South Puget Sound, Building Owners and Managers Association Tri-Cities, Building Owners and Managers Association Spokane, and NAIOP - Washington State Chapter

A. Introduction

Building Owners and Managers Association Seattle/King County, Building Owners and Managers Association South Puget Sound, Building Owners and Managers Association Tri-Cities, and Building Owners and Managers Association Spokane (collectively, "BOMA") are associations of owners and managers of commercial buildings of various kinds including, but not limited to, offices, hotels, factories, warehouses, retail and multi-family residential buildings. BOMA's members routinely purchase commercial property insurance containing resulting or ensuing loss clauses. Collectively, these members pay over $25 million annually in insurance premiums in Washington alone for such coverage.

NAIOP - Washington State Chapter ("NAIOP") is a trade association for developers, owners and investors in the industrial, office, and commercial real estate industries. The chapter was founded in 1976 and today has nearly 700 members representing most of the region's leading firms in commercial real estate development.

Often, as in this case, the "Washington Amendatory Endorsement" is added to BOMA's and NAIOP's members' policies, which replaces any introductory paragraph preceding an exclusion or list of exclusions with the words "*solely and directly* results in loss or damage." (Emphasis added.) Proper functioning of ensuing/resulting loss coverage, and

application of the "resulting loss" and "solely and directly" wording, is critical to the proper and intended purpose of property insurance in general. Application and interpretation of these terms is of widespread importance to building[1] owners and contractors, and does not involve only minor or "niche" issues. The approach to the resulting/ensuing loss clause represented by the *Sprague*[2] decision in Division I is in accordance with the expectations of BOMA's and NAIOP's members and is consistent with the standard wording of resulting loss clauses. As briefly summarized below, the ruling and reasoning of Division II in the *Vision One*[3] case dramatically and improperly *limits* resulting loss coverage and *expands* what was intended to *narrow* the exclusions by use of the "solely and directly" limitation on excluded causes of loss. The holding and reasoning of *Vision One* contravenes established Washington precedent and has widespread public impact.

Even if the Supreme Court agrees with Division II's holding in *Vision One*, clarification of this holding in light of the *Sprague* decision is

---

[1] While the petitioning associations are concerned primarily with commercial property insurance, the pertinent "resulting loss" analysis is the same for homeowner's policies such as that involved in *Sprague v. Safeco Ins. Co.*, 2010 Wn. App. LEXIS 2419 (Div. I, Nov. 1, 2010).

[2] *Id.*

[3] *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 2010 Wn. App. LEXIS 2322 (Oct. 19, 2010).

necessary so that insureds and insurers are able to contract for the precise level of coverage they deem most appropriate.

The amicus parties request that this Court accept review of the *Vision One* decision to determine, with certainty, how the provisions at issue will be interpreted by Washington courts. The moving parties, as well as many others in the real estate industry, need these issues clarified so that they can make informed decisions concerning their purchase of property insurance.

B. Resulting Loss Coverage

Resulting loss coverage is not limited to Faulty Workmanship exclusions. Many exclusions apply to the coverage and although sometimes limited to specified losses it sometimes is not. The "Faulty Design" exclusion[4] in the Philadelphia policy, for example, specifically limits resulting loss coverage to "fire" and "explosion." *See* discussion at pp. 5-6 of Philadelphia's Answer to Petition for Review and CP 5977 (¶B(2)(e)). The same is true for the Earth Movement exclusion, CP 5977 (¶ B(1)(f)), and the Water exclusion, CP 5977 (¶ B(1)(e)). The Faulty Workmanship resulting loss provision *contains no such restriction or*

[4] This exclusion is also modified by the "solely and directly" language discussed *infra* in Section B.

limitation. Had Philadelphia meant to narrow the resulting loss provision in the Faulty Workmanship exclusion, it certainly knew how to do so.

When the actual wording of the pertinent Philadelphia policy provisions is analyzed, the following conclusions can be drawn:

- All risks of physical loss are covered unless excluded.[5]
- Losses "solely and directly" caused by faulty workmanship are excluded.
- Losses that "result" from faulty workmanship are covered unless some other exclusion applies.
- Coverage for losses that "result" from faulty workmanship is not limited to losses that "indirectly" result or losses that "independently" result. [Had Philadelphia intended to limit resulting losses to those which were "independent" or "indirect", it could have done so. It did not.]

The *Vision One* court's unilateral importation of the terms "indirect" and "independent" into the insurance contract violates long-standing rules of liberal construction in favor of the insured[6] and impermissibly re-writes the parties' contract. In addition, use of words such as "independent" and "indirect" creates vagueness and uncertainty

---

[5] The Philadelphia policy provides that "Covered Causes of Loss" means "Risks of Direct Physical 'Loss' to Covered Property unless the 'loss' is excluded." *See* ¶ A(4). "Loss" is defined as "accidental loss or damage." *See* ¶ F(1).

[6] *See, e.g., Mutual of Enumclaw Ins. Co. v. Jerome*, 66 Wn. App. 756,760, 833 P.2d 429 (1992), citing *Britton v. Safeco Ins. Co.,* 104 Wn.2d 518, 528, 707 P.2d 125 (1985); *Ross v. State Farm Mut., etc.*, 132 Wn.2d 507, 516-517, 940 P.2d 252 (1997).

because these words themselves are subject to varying interpretations or applications to particular facts.

For example, the Division II Court makes clear that a fire is considered "independent" and "indirect" but does not explain why a collapse is somehow less independent or not independent and is somehow less "indirect."[7] Some types of faulty workmanship create the potential for fires to result. Some types of faulty workmanship create the potential for collapses to result. Other types of faulty workmanship create the potential for broken pipes to result. These are just a few examples. The imposition of the "independent" and "indirect" conditions on resulting loss coverage is unwarranted and contrary to established Washington case law.

On the other hand, the "separate property" test referred to by Division II and utilized by the trial court and by other courts[8] is consistent with the wording and is thus a reasonable interpretation of the wording of

---

[7] Indeed, even Philadelphia's own insurance expert, Andrew Shemchuk, admitted at trial that there was no substantive difference between fire and collapse in the context of a resulting loss clause in a faulty workmanship exclusion. *See* RP pp. 1242-1243.

[8] See, e.g., *Allianz Ins. Co. v. Impero*, 654 F. Supp. 16 (E.D. Wash. 1986); *Alton Ochsner Medical Fnd. v. Allendale Mut. Ins. Co.*, 219 F.3d 501 (5th Cir. 2000); *Montefiore Medical Center v. American Insurance Co.*, 226 F. Supp. 470 (2002); *VELCO v. Hartford Steam Boiler,* 72 F. Supp. 2d 441 (D. Vt. 1999).

the resulting loss coverage in the standard forms.[9] The "separate property" approach is one which has been characterized as a "bright line" approach.[10] As many courts have ruled, where the resulting damage is to property *other than* the property containing the faulty workmanship, the resulting loss coverage applies. In contrast, where the claimed "damage" is in substance the faulty workmanship itself, first party insurance should not be transformed into a performance bond to require a contractor to simply repair faulty workmanship that has had no resulting loss consequence.

Importantly, the key language of the policy at issue in *Sprague* is not substantively different than the language of the Philadelphia policy at issue in *Vision One*. Bearing in mind that both are "all risk" policies, not "named perils" policies, and that neither excludes collapse, the pertinent language is as follows:

VISION ONE:

---

[9] Where there is more than one reasonable interpretation, the court will adopt the interpretation most favorable to the insured, even where the insurer may have intended another meaning. *See, e.g., Allstate Ins. Co. v. Hammonds*, 72 Wn. App. 664, 865 P.2d 500, *review denied*, 124 Wn.2d 1010 (1994).

[10] Harrington, "Lessons of the San Francisco Earthquake of 1906: Understanding Ensuing Loss in Property Insurance," 37 SUM BRIEF 28, page 5, Copyright (2008) American Bar Association Journal.

> "But ***if loss*** or damages by a Covered Cause of Loss ***results***, ***we will pay*** for the loss or damage caused by that Covered Cause of Loss."
>
> "Covered Causes of Loss" means "Risks of Direct Physical 'Loss' to Covered Property," ***unless excluded***. (Emphasis added.)
>
> **SPRAGUE**:
>
> However, ***any ensuing loss not excluded is covered***. (Emphasis added.)

In *Sprague*, Division I correctly recognized, under this functionally identical "ensuing loss" language, that the collapse of a deck caused by failure of rot-weakened supporting beams was covered even though rot damage was excluded. As explained by that Court:

> [T]he losses that are faulty construction and rot are not covered, but the "ensuing losses," those that result from such faulty construction or rot, are covered *because such an ensuing loss is not excluded elsewhere in the policy.* (Emphasis added.)[11]

Nowhere in the *Sprague* decision is there any reference to "independent" or "indirect" language. As in *Vision One*, the terms "independent" and "indirect" are nowhere to be found in the policy.

To summarize, Division II's imposition of "independent" and "indirect" conditions on resulting loss coverage is unwarranted under existing insurance contract interpretation rules because terms not used by the carrier are being added by the court to limit coverage, and because the

---

[11] *Sprague*, 2010 Wn. App. LEXIS *4-*6 (footnotes omitted).

"separate property" test is a reasonable[12] interpretation of the words that the insurer in fact used. Additionally, the "independent" and "indirect" conditions imposed by Division II are vague and unworkable, particularly when compared to the "separate property" test used by many courts, including the trial court in this case.

C. Sole Cause Versus Predominant Cause

As pointed out in the petition and in the briefing below,[13] the "directly and solely results in" language in the Washington Amendatory Endorsement narrows the scope of the exclusion. The *Vision One* court's addition of "predominant" cause wording *expands* the exclusion from the narrow wording selected by the insurer.[14] The efficient proximate cause test was imposed by the courts where the unadorned words "caused by" were used by the insurer. The efficient proximate cause test *limited* the scope of exclusions that used the unmodified term "caused by" so that where excluded causes were not the predominant cause, coverage could

---

[12] See Philadelphia representative John Kirby testimony at CP 6543-45 and 13117. Vision made that point in its brief below. Vision Br. at 26-27.

[13] See § (c) of Vision's response brief, beginning at p. 42.

[14] The additional wording in the Endorsement, regarding "initiates a sequence of events," is not at issue because it was not asserted by the insurer in its denial of coverage letter and was precluded from consideration by an order in limine that was not appealed from. 4/03/08 RP 177-78, 9/16/08 RP 253-54.

not be denied. To impose the efficient proximate cause approach on exclusion causation wording that is already narrowed by the "solely and directly" wording is to turn the efficient proximate cause rule on its head. There is no basis in contract interpretation, law or policy to expand a narrowly worded "solely and directly" exclusion to exclude a loss where the excluded "sole" cause is in fact not the sole cause, but is only the predominate cause amongst other causes.

D. Conclusion

BOMA and NAIOP submit that the Pierce County Superior Court was correct on both the "sole" cause and resulting loss rulings and that Division II's ruling should be reversed. At a minimum, this Court should review and clarify the contradiction between *Sprague* and *Vision One.* These conflicting decisions create real and substantial confusion for the many and varied consumers of first party property insurance in this State.

RESPECTFULLY SUBMITTED this 14th day of January, 2011.

LANE POWELL PC

By _____
Joseph E. Lynam, WSBA No. 12728
Abraham K. Lorber, WSBA No. 40668

Attorneys for Amici Curiae Building Owners and Managers Association Seattle/King County, Building Owners and Managers Association South Puget Sound, Building Owners and Managers Association Tri-Cities, Building Owners and Managers Association Spokane, and NAIOP -Washington State Chapter

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2011, I caused to be served a copy of the foregoing **AMICUS PETITION** on the following person(s) in the manner indicated below at the following address(es):

Counsel for Vision One:
Jerry B. Edmonds, WSBA #6639
Daniel W. Ferm, WSBA #2908
Teena M. Killian, WSBA #15805
Williams Kastner
601 Union Street, Suite 4100
Seattle, WA 98101

SENT VIA:
☐ Fax
☒ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☐ E-file / E-mail

Counsel for RSUI:
Michael D. Helgren, WSBA #12186
David R. East, WSBA #31481
Barbara H. Schuknecht, WSBA #14106
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, WA 98101-3143

SENT VIA:
☐ Fax
☒ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☐ E-file / E-mail

Charles K. Wiggins, WSBA #6948
Wiggins & Masters, P.L.L.C.
241 Madison Avenue N
Bainbridge Island, WA 98110

SENT VIA:
☐ Fax
☒ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☐ E-file / E-mail

Kenneth W. Masters, WSBA #22278
Shelby R. Frost Lemmel, WSBA #33099
MASTERS LAW GROUP, PLLC
241 Madison Avenue N
Bainbridge, Island, WA 98110

SENT VIA:
☐ Fax
☒ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☐ E-file / E-mail

Co-counsel for Respondent Philadelphia Indemnity Ins. Co.:
J. Dino Vasquez, WSBA #25533
Thomas D. Adams, WSBA# 18470
Celeste M. Monroe, WSBA #35843
KARR TUTTLE CAMPBELL
1201 Third Avenue, Suite 2900
Seattle, WA 98101-3028

SENT VIA:
☐ Fax
☒ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☐ E-file / E-mail

Counsel for Berg Equipment & Scaffolding Co. Inc.:
Daniel F. Mullin, WSBA #12768
Tracy A. Duany, WSBA #32287
Kiera M. Silva, WSBA #34897
MULLIN LAW GROUP PLLC
101 Yesler Way, Suite 400
Seattle, WA 98104

SENT VIA:
☐ Fax
☒ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☐ E-file / E-mail

D. Michael Shipley, WSBA #18257
14009 – 42nd Avenue E
Tacoma, WA 98446

SENT VIA:
☐ Fax
☒ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☐ E-file / E-mail

Peter T. Petrich, WSBA #08316
ATTORNEY AT LAW
920 Fawcett Avenue
Tacoma ,WA 98402-5606

SENT VIA:
☐ Fax
☒ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☐ E-file / E-mail

Dennis J. Perkins, WSBA #05774
ATTORNEY AT LAW
1570 Skyline Tower
10900 NE 4th St
Bellevue WA 98004-5873

SENT VIA:
☐ Fax
☒ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☐ E-file / E-mail

M Doherty
Maureen Doherty, Legal Assistant